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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1954.

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**No. 772**

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BRUTUS LEWIS,
*Petitioner, and*
*Defendant-Appellant below,*

*vs.*

UNITED STATES OF AMERICA,
*Respondent, and*
*Plaintiff-Appellee below.*

---

## PETITION FOR WRIT OF CERTIORARI.

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*Plaintiff-Appellee below.*

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## PETITION FOR WRIT OF CERTIORARI.

---

*To The Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States:*

Your petitioner, Brutus Lewis, defendant-appellant below, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Seventh Circuit, entered on March 16, 1955, and the order denying a petition for rehearing, entered by said court on April 6, 1955.

## OPINION BELOW.

The opinion of the Court of Appeals for the Seventh Circuit, dated March 16, 1955, is herewith reproduced.

In The

UNITED STATES COURT OF APPEALS

For the Seventh Circuit

---

No. 11289 October Term, 1954, January Session, 1955

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THE UNITED STATES OF AMERICA,
*Plaintiff-Appellee,*
*vs.*
BRUTUS LEWIS,
*Defendant-Appellant.*

} Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.

---

March 16, 1955.

---

Before MAJOR, FINNEGAN and LINDLEY, *Circuit Judges.*

FINNEGAN, *Circuit Judge.* Defendant, Lewis, was convicted below, after waiving a jury, for violating 21 U.S.C. § 174(a) and 26 U. S. C. § 2554(a). He contends that the government's evidence failed to establish his guilt beyond a reasonable doubt. We disagree. *United States* v. *Aman,* 210 F. 2d 344, 349 (7th Cir. 1954), *United States* v. *Holmes,* 187 F. 2d 222 (7th Cir. 1951). It would neither aid defendant, nor do more than accumulate precedent on well-settled principles, to detail all the facts we encountered canvassing this record. We are satisfied reversible errors are absent and fundamental rights unimpaired.

The judgment of the District Court is affirmed.

Affirmed.

A true Copy:

Teste:

.....

*Clerk of the U. S. Court of Appeals for the 7th Circ.*

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## JURISDICTION.

Jurisdiction of this Court is invoked under Title 28, United States Code, Sections 1252-1257.

## QUESTIONS PRESENTED.

1. Was the evidence sufficient to establish the guilt of the defendant-appellant, beyond a reasonable doubt, as a matter of law?

2. Should the defense of entrapment be allowed?

## STATUTES INVOLVED.

Title 26, U.S.C., Sections 2553 (a) and 2554 (a).
Title 21, U.S.C., Section 174.

## STATEMENT.

The defendant, Brutus Lewis, was convicted on May 20, 1954 by the District Court, after a trial without a jury of Counts II and III of an indictment charging him with (1) the sale, and (2) the receiving, buying and transportation of 27 grains of heroin. The court imposed upon the defendant a sentence of three years in the custody of the Attorney General of the United States and a fine of One Thousand Dollars. (Tr. 99-100). The indictment, filed July 31, 1953, consisted of three counts which may be summarized as follows:

Count I was dismissed.

Count II charged that on December 13, 1952, at Chicago, Illinois, the defendant sold to Charles Montgomery for $17.50 twenty-seven grains of heroin not in pursuance of a written order of Charles Montgomery on a form issued

in blank for that purpose by the Secretary of the Treasury of the United States; in violation of Sec. 2554 (A) Title 26, United States Code.

Count III charged that on December 13, 1952, the defendant fraudulently and knowingly received, concealed, bought and facilitated the transportation and concealment of 27 grains of heroin knowing the same to be imported into the United States contrary to law; in violation of Sec. 174, Title 21, United States Code.

The lower Court, on appeal to the Circuit Court of Appeals, 7th Circuit, was affirmed on March 16, 1955. A motion for rehearing was filed and denied April 6, 1955.

## REASONS RELIED ON FOR ALLOWING WRIT.

There was no evidence to support a Finding of Guilty in Count III. Nor was there evidence of scienter, nor receipt, concealment and buying of heroin as required by wording of statute.

Although the Court upheld the conviction on both Counts II and III, nevertheless, there was no evidence whatsoever to substantiate a guilty finding as to Count III, which charged *inter alia*, that "defendant did then and there fraudulently and knowingly received, conceal, buy and facilitate the transportation and concealment after importation of a quantity of a certain derivative of opium, to wit, 27 grains of heroin, knowing the same to be imported into the United States contrary to law."

The lower Court sentenced the defendant, after a finding of guilty on both Counts. It is fair to infer that if there had been a finding of guilty on the second Count only, the sentence presumably could have been less than the three (3) years, meted out. It is for this reason, therefore, that

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a request is made for a definite ruling on the sufficiency of evidence in Count III.

2. Entrapment is a complete defense.

Under the authority of *Sorrett* v. *U. S.*, 287 U.S. 453; 53 S. Ct. 210, the Court did not but should have made a definite finding that no entrapment existed. There was no evidence of previous sales by the defendant and there was no showing of a reasonable suspicion on the part of the enforcement personnel that the defendant was engaged in the commission of a crime, or was about to do so. See also *Morei* v. *U. S.*, 127 F. 2d, 827.

See also, *Heath* v. *U. S.*, 169 F. 2d, 1007; *Mitchell* v. *U. S.*, 143 F. 2d, 953, which is authority for the position that the government must prove reasonable grounds exist of unlawful activity before they may entrap a person into the commission of a crime.

3. There was insufficient evidence to sustain finding of "Guilty". The quantum of evidence, adduced by plaintiff, was insufficient to meet the requirements of preponderance of evidence in a civil case, let alone "beyond a reasonable doubt", which is required in a criminal case.

See *U. S.* v. *Wainer*, 170 F. 2d, 603 [7th Circ.], where this Court reversed a finding of "guilty", by the Court saying:

> "We *cannot agree that the defendant should go to prison on suspicion, even though*, it were a robust suspicion which this is not."

See *U. S.* v. *Kovich*, 201 F. 2d, 470 [7th Circ.], which was a civil case where the court held there was insufficient evidence to sustain an order directing the return of personal property.

See also *U. S.* v. *Litberg,* 175 F. 2d, 20 (7th Cir.), where the evidence was as consistent with innocence as with guilt. The Court in reversing went on to say that the lower Court *may draw inferences,* but reviewing Court is charged with responsibility of determining reasonableness of such inferences.

4. Testimony of Steve Lewis, a government witness and a thrice convicted felon, with multiple inconsistencies should have been discredited and rejected as inherently irresponsible. The doctrine of *falsus in uno, falsus in omnibus,* is applicable here. There were glaring inconsistencies in the testimony of the two government witnesses.

a. Agent Montgomery claimed he asked for a "horse" (P. 21);

b. Agent Lewis claimed he asked for a horse (P. 35).

Further that there was no sale of the article within the meaning of the Act and under the law applicable here.

5. This Court erroneously disregarded testimony of defendant's witnesses, Geraldine and Alexine Dunsmore, who testified that no such transaction was made as the government's witnesses contended. Their testimony was unimpeached and should have received full credence.

## CONCLUSION.

For the foregoing reasons it is respectfully urged that these facts warrant a confession of error by the government and that a Writ of Certiorari be granted.

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No. 772

# In the Supreme Court of the United States

OCTOBER TERM, 1954

---

HERBERT LEWIS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

BRIEF FOR THE UNITED STATES IN OPPOSITION

---


SIMON E. SOBELOFF,
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# In the Supreme Court of the United States

OCTOBER TERM, 1954

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No. 772

BRUTUS LEWIS, PETITIONER

*v.*

UNITED STATES OF AMERICA

---

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT*

---

## BRIEF FOR THE UNITED STATES IN OPPOSITION

---

### OPINION BELOW

The opinion of the Court of Appeals (Pet. 2; R. 124) is not yet reported.

### JURISDICTION

The judgment of the Court of Appeals was rendered on March 16, 1955 (R. 126) and a petition for rehearing was denied on April 6, 1955 (R. 125). The petition for a writ of certiorari was filed on May 6, 1955. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the evidence is sufficient to support petitioner's conviction for narcotics offenses.

STATUTE INVOLVED

21 U.S.C. 174 provides in pertinent part:

> Whoever fraudulently or knowingly imports or brings any narcotic drug into the United States or any territory under its control or jurisdiction, contrary to law, or receives, conceals, buys, sells, or in any manner facilitates the transportation, concealment, or sale of any such narcotic drug after being imported or brought in, knowing the same to have been imported contrary to law, or conspires to commit any of such acts in violation of the laws of the United States, shall be fined not more than $2,000 and imprisoned not less than two or more than five years. * * *
>
> Whenever on trial for a violation of this section the defendant is shown to have or to have had possession of the narcotic drug, such possession shall be deemed sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury.

STATEMENT

After having waived his right to trial by jury (R. 7), petitioner was found guilty under two counts which charged narcotics violations under 21 U.S.C. 174 (count 3) and 26 U.S.C. 2554(a) (count 2) (R. 3-4, 92). He was sentenced gener-

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ally to a term of imprisonment of three years and to pay a fine of $1,000 and the costs of prosecution (R. 98). On appeal, the judgment of conviction was affirmed (R. 126).

The evidence adduced in support of the verdict may be summarized as follows:

On December 12, 1952, about 8:30 or 9:00 P.M., special government employee Steve Lewis and federal narcotics agent Charles S. Montgomery visited petitioner, whom Steve Lewis knew, at the Graymont Hotel in Chicago (R. 10, 13, 15-29). Lewis asked petitioner if he was still working for Harry Chenault. Petitioner replied "Yes". (R. 16, 17, 29.) Lewis then introduced agent Montgomery as "Bill Ramsey" and informed petitioner that he and Ramsey were partners, were beginning to deal in narcotics and were interested in doing business with petitioner (R. 10, 17, 29, 30). Petitioner replied "that would be swell" (R. 30). Present in the room were two other men and two women, who were using narcotics (R. 10, 29). Petitioner asked Lewis and Montgomery how much "stuff" they wanted and was told 1/16th of an ounce (R. 17, 30).[1] Petitioner said "O.K.", stepped out into the hall, and asked Lewis to join him (R. 11, 18, 30). In the hall, petitioner asked Lewis if he knew the man who accompanied him to the hotel. Lewis replied that he was his brother. (R. 11, 19.) Thereupon petitioner told Lewis to return to the room

[1] Lewis testified that he told petitioner they wanted 1/16th of an ounce (R. 11) and Montgomery said that he did (R. 30, 36).

and petitioner would be right back (R. 11, 20). Lewis did so. Within a few minutes, petitioner handed a package to agent Montgomery, for which Montgomery gave him $17.50. (R. 20, 30.) Before leaving, Montgomery asked petitioner whether they would be able to contact him again. Petitioner said that they could contact him through the DuSable Lounge at 39th and Oakwood Boulevard. (R. 24, 30.) Upon analysis, the package which petitioner gave Montgomery was determined to contain heroin (R. 32). There were no tax stamps on the package and the transfer was not made pursuant to the required Treasury form (R. 12, 32).

Petitioner testified as follows:

After Montgomery and Steve Lewis entered his room, Steve Lewis asked Montgomery to go into the hall. While Montgomery was out of the room, Lewis asked petitioner if he were still "selling stuff". Petitioner said that he never sold any "stuff". Lewis said he heard that petitioner did, and that he wanted to buy some. Thereupon petitioner told him to "get on out". (R. 51.)

Petitioner said that at that time the only other persons in the room were two women, Geraldine and Alexine Dunmore, with whom he had been playing cards (R. 49, 51, 53). The women testified that when Montgomery and Lewis arrived, Montgomery left the room while petitioner and Lewis talked (R. 62-63, 71-72). In rebuttal, Montgomery and Lewis testified that Geraldine and Alexine

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Dunmore were not the two women who were in petitioner's room when they visited petitioner on December 13, 1952 (R. 79, 82).

ARGUMENT

The Statement, *supra*, pp. 2-5, clearly demonstrates the frivolousness of petitioner's general attack (Pet. 5) upon the sufficiency of the evidence to support his conviction. Equally frivolous are petitioner's additional specific challenges. His argument (Pet. 4-5) that the conviction under count 3 must fall because there was no evidence of scienter, receipt, concealment or buying as required by 21 U.S.C. 174 overlooks that portion of the statute which makes possession of a narcotic drug "sufficient evidence to authorize conviction unless the defendant explains the possession to the satisfaction of the jury".

To argue as petitioner does (Pet. 6) against the verdict because of trivial inconsistencies in the testimony of government witnesses, and because the testimony of defense witnesses was not accepted, usurps the trial court's function. The judge stated, in arriving at his verdict, that (R. 92):

> Upon a consideration of all of the evidence and particularly with reference to the appearance and demeanor of the witnesses on the stand, the circumstances surrounding the witnesses at the time about which they are testifying, the position of the witnesses and the nature of their employment, I feel that the government has clearly proved its case beyond a

reasonable doubt as to the charges in Counts 2 and 3.

Petitioner contends (Pet. 5) that the judge should have found that there was entrapment. But neither in his argument before the trial court nor in the presentation of his evidence did petitioner raise this defense. Entrapment is a defense which must be raised and proven specifically by the defense. *Sorrells* v. *United States*, 287 U.S. 435, 452; *Claiborne* v. *United States*, 77 F. 2d 682, 691 (C.A. 8); *United States* v. *Pappagoda*, 288 Fed. 214 (D. Conn.). Such a defense admits the commission of the offense, whereas petitioner's sole defense at the trial was to the contrary, i.e., that he did not commit the acts in question.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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MAY, 1955.

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